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Future Interests

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federal courts, although the courts of Michigan are contra. Neither the Supreme Court of Ohio nor any appeals court has yet ruled upon this question.

In *Vukovic v. Walnut Grove County Club*, a personal injury case, plaintiff's physician testified in her behalf. On cross-examination, without objection by plaintiff, and upon re-direct, the witness was interrogated fully as to her physical condition and case history. This procedure constituted a voluntary waiver of plaintiff's rights under the physician-patient privilege statute, and defendant was properly permitted to introduce in evidence a written statement of plaintiff's physician relating to her physical condition, including some family history which the physician had obtained while attending her in his professional capacity.

**Clinton DeWitt**

**FUTURE INTERESTS**

*Construction of Deeds*

*To B for life "then to the heirs of his body their heirs and assigns forever."*

The conveyances by will and by deed of various tracts of land by Samuel B. Hoppes, his wife, and their four children are the subject of the declaratory judgment in *Hoppes v. American National Red Cross*. In 1912, A (Samuel B. Hoppes) conveyed by deed a tract of land to his son, B (John Hinton Hoppes) "for the term of his natural life, then to the heirs of his body, their heirs and assigns forever." B reconveyed to A in fee simple. A reconveyed to B in fee simple. B mortgaged this tract in 1939, 1948, 1953 and 1954. In 1954 B devised to the American National Red Cross the net proceeds from the sale of this tract. The Fayette County Court of Common Pleas, in its opinion, assumed that B received an estate in fee tail for his life. It is difficult to understand how the court reached this conclusion since the cases which the court relied upon involve conveyances "to B and the heirs of his body." If the conveyance in 1912 in the Hoppes case had been "to B for life, remainder to the heirs of his body," the court might properly have held that B received a life estate, and by the operation of the Rule in Shelley's case a vested remainder in fee tail, which would merge to give B the fee tail estate. The Ohio Statute

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7 124 N.E.2d 463 (Ohio App. 1953).
8 *Ohio Gen. Code § 11494* (Now *Ohio Rev. Code § 2317.02*).
would then convert B's fee tail into an estate in fee tail for his life with a contingent interest (possibly a remainder) in fee simple in the heirs of his body.\(^3\) The reversion would be in A. The deeds from B to A in fee simple and from A to B in fee simple would not destroy the interest of B's issue (heirs of his body) because of the specific Ohio statute and also because at the common law the interest of the issue in a fee tail estate could not be destroyed by merger.

But, the conveyance to B in the Hopper case was "to B for the term of his natural life, then to the heirs of his body their heirs and assigns forever." (Emphasis supplied). The words "heirs of his body" were probably used as words of purchase, and the words "their heirs and assigns forever" were probably used as words of limitation. Consequently, this language might be construed as creating the following estates: life estate in B, contingent remainder in fee simple in the heirs of B's body, reversion in fee simple in A defeasible on the death of B survived by heirs of his body.\(^4\) The contingent remainder under common law principles would be destroyed when B surrendered his life estate to A.\(^5\) B received the fee simple absolute when A reconveyed to B in fee simple. The writer believes that the attorney who prepared the surrender by B of his life estate to A intended to destroy the contingent remainder in the heirs of B's body. A surrender (reconveyance) by the life tenant to the reversioner was a normal way of destroying contingent remainders at the common law. Also, the deed of reconveyance specifically recites that its purpose was "to vest the fee simple title to said premises in the grantee."

Since the son, B, died survived by no heirs of his body, the court's construction and the suggested construction of the remainder "to the heirs of his body their heirs and assigns forever," both support the conclusion that the American National Red Cross is entitled to the net proceeds and that the tract is subject to the liens of the four mortgages.

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\(^1\) 128 N.E.2d 851 (Ohio Com. Pl. 1955).

\(^2\) The Rule in Shelley's Case was abolished as to gifts "by will to any person for his life, and after his death to heirs in fee" as of October 1, 1940. 38 Ohio Laws 120 (1840). It was not abolished as to conveyances by deed until August 21, 1951. 119 Ohio Laws 348 (1941).

\(^3\) By statute effective June 1, 1812 "all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." 3 Rev. Stat. of Ohio 2293 (Curwen 1811).

\(^4\) Williams v. Haller, 13 Ohio N.P. (N.S.) 329 (1912); Whitson v. Barnett, 237 N.C. 483, 75 S.E.2d 391 (1953). Contra, Sybert v. Sybert, 152 Tex. 106, 254 S.W.2d 999 (1953), (to B for life only, then "to rest in fee simple in the heirs of his body").

\(^5\) See White, Some Ohio Problems As to Future Interests in Land, 1 U. Cin. L. Rev. 36 (1927). A statute which became effective January 1, 1932 provides that "An expectant estate cannot be defeated . . . by . . . merger." Ohio Rev. Code § 2131.06.
However, if B had died survived by heirs of his body, under the suggested construction the contingent remainder would have been destroyed by merger. But, under the court's construction, the heirs of B's body would have taken under the Ohio statute relating to fee tail estates.

The fact that the court treated the words "heirs of his body" as words of limitation and not as words of purchase and ignored completely the words "their heirs and assigns forever" will make more difficult the draftsman's problem of setting forth the estates intended to be created by a will or deed.

Construction of Wills

Reference to Expected Title

The second question before the court in the *Hoppes* case involved a devise by John Hinton Hoppes to three children of his brother. This devise was preceded by the following recital as to testator's source of title:

whereas my mother, Nancy Hoppes, has made a will devising to me fifty acres of land... in the event that I shall survive her and inherit from her said land, I give and devise said land to...

John Hinton Hoppes executed his will in 1946 and died in 1954. In 1951 he received under his mother's will only a life estate, but in 1952, by deeds from all the remaindermen, he received the fee simple. The court properly held that the recital in John's will was not a limitation but only a statement as to how he expected to receive the title in fee simple.

Remainder to Testator's Grandchildren

The third question before the court in the *Hoppes* case involved the will of Samuel B. Hoppes. Samuel died in 1935. He apparently devised a present life estate to his wife (who died in 1951) because the portion of Samuel's will which is quoted in the opinion reads in part as follows:

After the death of my said wife, Nancy Hoppes, I give and devise...
two farms... to my son John Hinton Hoppes, during his natural life.
After the death of my said son, John Hinton Hoppes, I give and devise said Real Estate to my grandchildren, their heirs and assigns forever absolutely and in fee simple, each to share equally.

One of Samuel's grandchildren, who was living when Samuel died, predeceased his uncle, John Hinton Hoppes. This grandchild was unmarried and was survived by his parents who are still living.

The court properly held that survival by the grandchildren of Samuel until the termination of all life estates was not a condition precedent and
that the parents of the deceased grandchild inherited his undivided share.

The court correctly states that the remainder to the grandchildren vested in those who were living at the death of the testator, Samuel B. Hoppes. But in its seventh finding the court states that on the death of the life tenant, John Hinton Hoppes, "each of the fourteen grandchildren then living became vested with an undivided one-fifteenth fee simple estate . . . and . . . the . . . parents of Ronald J. Hoppes, deceased . . . became vested with the remaining undivided one-fifteenth fee simple estate therein." (Emphasis supplied). The court's use of "vest" to mean vest in interest, then later, to mean vest in possession is unfortunate,

**Remainder to "then living issue of my children, . . . per capita and not per stirpes."**

_The Cleveland Trust Company v. Johnson_ 6 is an action for a declaratory judgment as to the will of Mary L. Johnson. The will was drafted by her son, "an able and experienced lawyer." Item IV of this will stated that

Upon the death of the last survivor of my two sons above-named, this trust shall cease and determine and the entire amount of the principal thereof . . . shall be paid over by the Trustee to the then living issue of my children, including the issue of my deceased son, Malcolm B. Johnson, per capita and not per stirpes.

When testatrix executed her will she had no great-grandchildren. But, at the time for distribution, there were ten grandchildren and sixteen great-grandchildren, including a great-grandchild who had been conceived.

The court properly directed a per capita distribution among the ten grandchildren and the sixteen great-grandchildren of testatrix because of the specific language of the will. But, the statement of the court that the word "issue," in the absence of qualifying words, includes all degrees of descendants is somewhat misleading. Although the word "issue" is more inclusive than "children" or "grandchildren," when there is a gift to the issue of a named person it has been held that the living descendants exclude their own children and that children of a deceased descendant take their parent's share. 7

If testatrix had not directed a distribution "per capita and not per stirpes" then descendants of living issue should be excluded by their parents. A per capita distribution of the principal among all lineal descendants is contrary to the normal desires of a testator. 8

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7 2 SIMES, LAW OF FUTURE INTERESTS § 427 (1936); RESTATEMENT, PROPERTY § 303 (1940); Watson v. Watson, 34 Ohio App. 311, 171 N.E. 257 (1929).
8 Note, 7 WESTERN RES. L. REV. 186 (1956).